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IN THE

Supreme Court of the United States

October Term, 1933, No. 611

ELECTRIC CABLE JOINT COMPANY,
Petitioner,

against

BROOKLYN EDISON COMPANY, INC.,
Respondent.

BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement of Facts

The decision which petitioner seeks to bring up for review has been made by the Circuit Court of Appeals for the Second Circuit in an ordinary patent suit, and adjudges claim No. 4 (the only one relied on) of the patent void. The ground upon which the issuance of a writ of certiorari is asked by petitioner, is that the decision is in conflict with a decision made by the Circuit Court of Appeals for the Sixth Circuit, December 6, 1929, adjudging claims Nos. 3 and 4 of said patent valid and infringed (*Metropolitan Device Corporation* v. *Cleveland Electric Illuminating Co.*, 36 Fed. (2) 477).

But there was no conflict of decision; the two cases were decided on very different records, as was specifically found

by the District Court and by the Court of Appeals in the Second Circuit.

The patent (No. 1172322) was issued to Philip Torchio February 22, 1916, and expired February 22, 1933.

The alleged invention is a so-called device for preventing current leakage at a joint in an electric line conductor. It consists of a joint construction having a combination (claim No. 4) comprising (1) an ordinary lead sheathed electric cable, with the sheath sufficiently removed to expose the joint, and the copper conductors joined, or having a joint; (2) a body of pervious insulating material wrapped about or inclosing said joint; (3) an ordinary lead sleeve of a diameter greater than the body of pervious insulating material around the joint inclosing the same and united at its ends to the cable sheath; (4) a receptacle communicating with the interior of said sleeve, and (5) an insulating oil or other liquid, fluid at low temperature, contained in said receptacle and sleeve.

The only things claimed by plaintiff to be new in this construction or combination were the receptacle and the insulating oil or liquid, fluid at low temperature. (1: pp. 91-2, ff. 273-4). It was not claimed, however, that Torchio discovered that oil is an electrical insulating liquid (1: p. 91, f. 272).

The District Court and the Circuit Court of Appeals in the Second Circuit, on ample evidence, found that the use of oil or of an insulating liquid, fluid at low temperature, in the same combination, had been disclosed in printed publications, and was known in the prior art, before the alleged discovery by Torchio. It was also found and held that the reservoir or receptacle communicating with the interior of the sleeve had no patentable merit; did not render the

claim, otherwise invalid, patentable; was foreshadowed by a prior patent (11: p. 914); and that the reservoir used by defendant is in construction, character and use substantially different from the receptacle of the Torchio patent, and it is physically impossible to employ or use said receptacle as a substitute for defendant's reservoir (11: pp. 874-5, ff. 2622-3),—that is, so far as the reservoir is concerned, there is no infringement.

It was also found that the evidence supporting the findings of disclosure of prior use of oil or an insulating liquid, fluid at low temperature, in such a combination, and the patent foreshadowing the outside reservoir, was not in the record in the case in the Sixth Circuit; "*nor did said record contain any equivalent or like evidence upon the basis of which like findings could there have been made*" (11: p. 873, f. 2618; p. 867, f. 2599; p. 859, f. 2575; p. 911). No findings of fact were made in the case in the Sixth Circuit; but an examination of that record shows that while there was evidence of the early use of oil as an insulating medium, no evidence was there produced of any use prior to Torchio of oil or of an insulating liquid, fluid at low temperature, in a construction or combination like that described in the Torchio patent. The Watson patent (Ex. Q, p. 395, R. Sixth Circuit; Ex. 7-H, p. 455, R. Second Circuit), the only example of prior art mentioned by petitioner as involving a like construction before the Sixth Circuit, is for an improvement in electric cables, and the Court of Appeals for the Sixth Circuit, saying there was "substantial basis for doubting whether Watson was prior to Torchio," held that the Watson patent "does not disclose joint construction or joint insulation" (36 Fed. (2) 479).

In the Sixth Circuit neither the District Court, nor the Circuit Court of Appeals, passed upon the question of the

effect of the receptacle mentioned in claim 4 of the patent as adding anything patentable to the construction or combination. A careful examination of the record in that case discloses that no contention whatever was presented on the trial that the receptacle of claim 4 in any way distinguished the construction or combination described in claims 3 and 4 or rendered the same patentable. The testimony of Mr. Torchio there was that when his joints were finally filled he took off the "grease cup," sealed the nipples, and relied on "the annular space around the wrapped portions of the joint," which in his joint was "sufficiently large to constitute a reservoir" (p. 38, R. Sixth Circuit),—an equivalent for the separate receptacle or chamber contemplated by his patent (R. II, p. 354, ll. 1-8), disclosed by Vernier (R. II, p. 773, fig. 13, p. 776, figs. 15 and 16).

As to the use of oil or an insulating liquid, fluid at low temperature, the District Court in the Sixth Circuit found that the elements of construction of claims 3 and 4 were "admittedly old in the art and in the same combination, with the alleged exception of the insulating fluid" (R. Sixth Circuit, p. 11), and held that the quality of invention was not present in what Torchio did, since it involved "nothing more than the selection of a well known insulating compound used in the same or similar circumstances to accomplish the same result" (R. Sixth Circuit, p. 12). The Circuit Court of Appeals, however, concluded, on the evidence there presented, that Torchio had substituted a liquid insulating compound for a compound not soft enough to flow, that this was "somewhat beyond the skill of an expert and amounted to patentable invention," and that the patent was there infringed by the use of a joint insulating compound "normally of the consistence of vaseline or jelly" (36 Fed. (2) 477, 479-80).

In the instant case in the Second Circuit defendant alleged and proved the following prior art not in evidence in the case in the Sixth Circuit:

(1) A British patent issued to Geipel in 1894 (No. 11280) for an improved method of jointing electric conductors, whereby the insulation of the joint is more easily effected. The joints are contained in boxes made of metal, wood, pot, or otherwise. After the joints are made the box is filled "with a suitable insulating material, as for example, *oil,* wax, bitumen or by a combination of any of these according to the nature of the insulation used for the conductor itself" (p. 724). It is said that while oil should not be used with rubber insulated conductors, or if used, the rubber should be kept from the oil, "with paper, jute, hemp, flax, cotton, or other suitable [that is, pervious] insulating material, the joints * * * are best surrounded by *oil*" (R. II, p. 724, ll. 40-45; p. 726, ll. 10-15). There is no basis for petitioner's statement that Geipel's conductors are "bared of insulation" (Brief for Petitioner, pp. 9-10). On the contrary, he mentions "paper or jute insulated conductors," and it is "rubber-insulated conductors" to which he refers, where he says the ends are "bared where they enter the *oil*" (R. II, p. 724, ll. 44-5) (italics ours).

(2) A description by de Gelder of the cable system of Amsterdam, published in 1911, dealing with high tension cables of 3,000 volts, where the ordinary operation of making the joint, including the wrapping of the exposed and jointed conductors with oil saturated linen tape, and enclosing the same with a lead sleeve soldered to the cable sheath is described (II: pp. 742-3). It is said by de Gelder that the Amsterdam system included both British and German cables (II: pp. 747-8) and that in filling the joint sleeve or socket, "the same mass, or rather the same *oil*, is used as

for impregnating the cable" (II: p. 745), and that with the British cables this "is *a rather thin resinous oil* at 15° C." (59° F.); while in the German cables "it is a thicker mass" (II: pp. 747-8) (italics ours). It is then said that the danger of breakdown decreases at higher temperatures, because the impregnating mass has become thinner, and "fills all of the pores better and penetrates everywhere," and the opinion is expressed that "a thinner mass gives a better guarantee against breakdown than the harder ones" (II: p. 748). De Gelder tells fully and specifically of the construction of joints identical with those described in the patent (II: pp. 742-3), and of the use of oil or an insulating liquid or compound, fluid at low temperature, therein. There is no equivalent disclosure by Watson. Where de Gelder speaks of the cable ends drying out, he is referring to vertical sections of cable "in transformer and cable booths, or in the central station," and not at all to joints or to cables in the ground (II: p. 749).

(3) In Baltimore, beginning in 1911 and continuing to the time of the trial, (I: p. 126, ff. 377-8; p. 128, ff. 383) elevated potheads on high tension electric cables were periodically filled with *oil* drawn from a spigot or tap in a barrel (I: pp. 152-3, Q. 390-393), and it was found that this oil penetrated and impregnated the cable wrapping and the joints as far as 1200 feet away (I: pp. 127-8, 132, 157). It was also observed that when the cables were heated by the current carried, the potheads overflowed (I. p. 124, ff. 370-1; p. 158, f. 473); that is, as the cables become heated by current passing through the same, the oil was caused to flow from the cable into the pothead. The use of oil had directly to do with joints, as the oil dissolved the paraffin in the joints and the joints were observed to be full of oil (I: pp. 128, 132-3, 157), and there were no failures in such joints (I: p. 127, f. 381; p. 128, f. 384; p. 134, f. 400).

(4) In the Journal of the Institution of Electrical Engineers (II: p. 759) an article was published by Charles Vernier in 1911, describing and illustrating extra high tension cable joints identical with and having the same combination as that described in claim No. 4 of the Torchio patent, except that no distinct external reservoir is shown or mentioned. Joints having a large internal holding capacity, however, are shown (II: pp. 773, 776). Vernier mentions the same difficulty with hard or solid joint compounds that Torchio does—that is, shrinkage on cooling, the liability for blow holes or air pockets to form in their mass, the ionization of this air and the consequent sparking in the gaps (II: pp. 772-3). He describes the use of white linen insulating tape, saturated with oil, constituting a body of pervious insulating material, wrapped about the cores or conductors (II: p. 772), describes the lead sleeve, wiped to the cable sheath (II: p. 777), and says that he considers it important that the sleeve of a wrapped joint should be filled with *oil* (II: p. 774), "which will keep the insulating tapes constantly impregnated," and adds: "this will be greatly assisted by the constant temperature changes which the cable undergoes under changes of load" (II: p. 774). With unwrapped joints, for which he expresses a preference he says: "Either an *oil* or a viscous joint-box compound—preferably the latter—which can *run* into the tubes and all parts of the joint-box" is used (italics ours). The viscous compound he describes as "of about the consistency of thick cream at ordinary temperatures. When heated it should run as freely as heated oil, so as to penetrate all crevices, and it must retain these features throughout its life" (II: pp. 775, 777). He shows domed sleeves and others with annular spaces sufficiently large to constitute a reservoir (II: pp. 773, 776).

Both the District Court and the Circuit Court of Appeals agreed that, except for the external receptacle, claim 4 of the Torchio patent contains nothing not fully disclosed in Vernier's article (II: p. 864; p. 914).

There is nothing in the Vernier article suggesting that he advocated the use of oil in joints *because*, in his opinion, it would not leak into the cable. On the contrary, after mentioning the tendency for blow-holes or air pockets to form in solid compounds (II: pp. 772-4), he says he considers it important that a joint insulated in the manner shown in his Fig. 12 (wrapped joints) should be filled with an oil, "which will keep the insulating tapes constantly impregnated, and this will be greatly assisted by the constant temperature changes which the cable undergoes under changes of load" (II: p. 774)—a definite recognition that the oil would flow, and of the so-called "breathing" of the cable.

(5). Prior to the tests made in December, 1914, and January and February, 1915 (Pltff's Exs. 27-63, inc.), as a result of which Torchio said, in his testimony in the case in the Sixth Circuit, that he applied for his patent* (R. Sixth Circuit, p. 36), it was shown in the instant case that early in August, 1914, Torchio was informed that in like joints made in Boston in July, 1914, the insulating liquid or compound placed in the joint was "about the viscosity of molasses" at ordinary temperature (II: pp. 641, 868, f. 2604; I: pp. 177, 259, f. 777)—a state of fluidity like that which was held to infringe by the Court of Appeals in the Sixth Circuit, which did not have this evidence before it.

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*The date, February 23, 1914, for Torchio's letter to Smith in the prevailing opinion in the Circuit Court of Appeals (p. 915) is a misprint. The true date is February 23, 1915 (see page 914 and Exhibit R. 11, p. 664). In the case in the Sixth Circuit, Torchio testified that the first time he had a conception of a joint filled with a compound, fluid at low temperatures, was sometime between December 14, 1914, and January 9, 1915 (R. Sixth Circuit, p. 104).

(6) In the Lemp transformer patent granted in 1895, adapted to furnish the heavy currents employed in electric welding, the invention provides a transformer wherein magnetic leakage (caused by wide separation) between the primary and secondary will be prevented. It is said that the primary may consist of any form of conductor, the invention in part consisting in making the secondary "as a liquid tight tube which envelopes the primary and in keeping the primary immersed in oil contained in said secondary." The patent contains provision for insulating the primary by asbestos cloth "loosely wound to allow the asbestos to take up the oil and to permit a partial circulation of oil therethrough." When the secondary has been fitted in place, "it is filled with oil, connection with a reservoir or supply pipe being maintained to allow for expansion under increase of temperature," and preferably some heavy cylinder oil is employed. An external reservoir is shown at "J" in Figs. 1 and 2 (11: pp. 730-4, 870, f. 2610).

While the Lemp patent is for an electric transformer, it provides everything that claim 4 of the Torchio patent provides, in the same combination and for the identical purpose, viz., for insulation against electrical losses. There is the primary consisting of any form of conductor, the equivalent of the copper conductors in the cable and joint; there is the secondary consisting of a liquid tight tube enveloping the primary, the equivalent, as an oil container, of the outer metallic sleeve; there is the asbestos cloth loosely wound about the primary to take up the oil and permit a partial circulation of oil through the same, the equivalent of the body of pervious insulating material wrapped about the jointed conductors; there is the oil with which the tubular secondary is filled, the equivalent of the oil or other liquid, fluid at low temperature; and there is the external reservoir and supply pipe, the equivalent of

the receptacle communicating with the interior of the sleeve, employed in both cases for the same purpose—to maintain the presence of insulating oil in the transformer and in the joint.

Summary of Argument

The Court has consistently held that a writ of certiorari will only be granted "in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal" (*Layne & Bowler Corp.* v. *Western Water Works*, 261 U. S. 387, 393).

(1) The patent has expired, and the instant case involves no principle the settlement of which is of importance to the public.

(2) No real conflict of opinion and authority between the Second and Sixth Circuit Courts of Appeals, is presented, as the two cases were decided on materially different states of proof.

(3) In a patent case a conflict in results as to the validity of the patent induced by such substantial dissimilarity in the facts as obviates any conflict of decision, does not present a case for review by this Court by writ of certiorari.

I

The patent has expired, and no principle the settlement of which is of importance to the public is involved.

The case is an ordinary patent case with the usual issues of invention, breadth of claims, and non-infringement. The

Court has repeatedly held that a writ of certiorari will not be issued in such a case, "unless it be necessary to reconcile decisions of Circuit Courts of Appeal on the same patent."

Keller v. *Adams-Campbell Co.*, 264 U. S. 314, 319;

Layne & Bowler Corp. v. *Western Water Works*, 261 U. S. 387.

Here the patent has expired, so that the public is no longer hindered by an apparent patent monopoly from freely making the joint described in the patent. The only questions as to the validity of the patent which can now exist, are questions between the owner of the patent and alleged infringers for acts occurring prior to the expiration of the patent. The public has no interest in these questions other than it has in like litigation between private persons.

II

There is no real conflict of opinion and authority between the Second and Sixth Circuit Courts of Appeals, involving this patent.

It is true that the Circuit Court of Appeals for the Sixth Circuit held claims Nos. 3 and 4 of this patent valid, whereas, the Circuit Court of Appeals for the Second Circuit has held claim No. 4 invalid. But the opinion and decree in the Second Circuit are based upon facts entirely different from the facts upon which the opinion and decree in the Sixth Circuit were founded.

In *Concrete Appliance Co.* v. *Gomery* (269 U. S. 177, 180), involving a conflict of decisions between the Sixth and Third Circuit Courts of Appeals as to the validity of the same patent, where it developed that there was "an evident

difference in the state of the proof in the two cases," and it appeared that the Court in the Sixth Circuit "did not have before it the detailed history of the practical development of the art" which was proven in the case in the Third Circuit, this Court said: "the adjudications of this patent by the two circuit courts are, we think, only apparently conflicting." So far as appears, this difference in the state of the proof did not there come to light until after the writ of certiorari had been granted and the decision was under review. While difference in results reached by the two circuit courts led this Court (the writ having been granted) to review the salient features of the state of the art, and to affirm the decree in the Third Circuit, it does not follow that the Court would have issued the writ had the difference in the state of the proof been pointed out when the writ was applied for. If the conflict in decision is *only apparent* and is not "a real and embarrassing conflict," the writ will not issue, as this Court was at pains to point out in *Layne & Bowler Corp. v. Western Water Works* (supra).

So far as the receptacle or external reservoir is concerned, it was for the first time adjudicated insufficient to make the Torchio joint construction or combination patentable in the instant case in the Second Circuit. The Circuit Court of Appeals for the Sixth Circuit, with which the alleged conflict exists, held that the use of oil or an insulating liquid or compound, fluid at low temperature, gave the combination patentability, but did not pass upon, or need to pass upon, the receptacle or reservoir as a constituent element of the combination. Moreover, it was not contended on the trial in the Sixth Circuit that the receptacle added an element of novelty to the combination. The instant decision in the Second Circuit is, therefore, not a

conflicting decision on that subject. The decision, moreover, is in accord with the like decision of this Court in *Concrete Appliances Co.* v. *Gomery* (269 U. S. 177), holding that the use of a central reservoir (which was called a "receptacle" in that patent) and suitable conduits to distribute and convey mobile or fluid substances by gravity, has found exemplification for centuries.

Is the decision in the Second Circuit that the use of oil or an insulating liquid or compound, fluid at low temperature, was disclosed by the prior art as a constituent element of a combination or joint construction like Torchio's, in conflict with the decision in the Sixth Circuit? The results of the two decisions are in conflict. But the decisions are not in conflict. Nothing that was decided in the Sixth Circuit is overruled, denied or questioned in the decision in the Second Circuit. The decision in the Second Circuit holds that the disclosure of the use of oil and of like insulating liquids, fluid at low temperature, in identical or substantially identical combinations and constructions, by Geipel, de Gelder and Vernier, and at Baltimore, in or prior to 1911, avoided any claim of novelty based on that element in the combination. And that decision is entirely new and distinguishes the case in the Second Circuit. These disclosures were never before passed upon in connection with the Torchio patent, and the decision is in no way in conflict with that in the Sixth Circuit, where none of these disclosures or facts were before the Court.

In the famous *Gaines* cases (12 How. 473; 24 How. 553; 6 Wall. 642), which were the subject of many appeals to this Court, it was said in the sixth appeal (24 How. 553, 556), which presented the controversy differently from what it had been before, that a different conclusion, "on account of testimony in this case which was not in that

(12 How. 473); * * * will not be contradictory," and that the decisions in the preceding cases may be considered "without our coming at all into conflict with any judgment heretofore given concerning the rights of the parties." But there was a conflict in results. In *Gaines* v. *Relf* (12 How. 473) it was held that Mrs. Gaines was an adulterous illegitimate, and could not take as the heir or devisee of her father. In *Gaines* v. *Hennen* (24 How. 553), and *Gaines* v. *New Orleans* (6 Wall. 642) it was held, on the basis of facts not proven in the first case, that Mrs. Gaines was the legitimate daughter of the marriage in good faith of her father and mother, and could take her father's estate as his universal devisee.

III

A case for review by this Court by writ of certiorari is not presented by a conflict in results as to the validity of a patent, where the later decision is induced by and based upon controlling facts substantially different from the facts relied upon in the earlier decision.

Rule 38 to the effect that a review on writ of certiorari will be granted only "where a Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter," is concerned with the maintenance of uniformity of decision between the several Circuit Courts of Appeals to preserve the integrity of the law as a body of judicial precedent.

Lau Ow Bew v. *United States*, 144 U. S. 47, 58;
American Const. Co. v. *Jacksonville, etc. Ry. Co.* 148 U. S. 372, 383;
Hamilton Shoe Co. v. *Wolf Bros.*, 240 U. S. 251, 258.

Lack of uniformity of decision can only be predicated on divergent decisions on the same or substantially the same controlling facts. Dissimilarity of facts and circumstances calls for dissimilarity in decisions. If several Circuit Courts of Appeals were making identical decisions, no matter how dissimilar the facts, the very uniformity in the results of such decisions would itself call for a review by this Court.

The decision of a court must be based upon and be responsive to the facts before the Court. New or different facts require new and different decisions. The prior art presented and considered in the instant case in the Second Circuit, but which was not before the Circuit Court of Appeals for the Sixth Circuit, renders the decision of the latter court obsolete as to the validity of this patent, leaving it binding only on the parties to that record. It is based upon and confined to a state of facts which, in view of this record, can never again be presented to a court in connection with litigation over this patent. The decision in the Second Circuit, which petitioner seeks to review, is in truth and fact not a second and conflicting decision, but is an initial, first and non-conflicting decision, and is based upon vital facts presented and considered for the first time in the instant case. In such a situation proper regard for the time and energy of this Court and the "great caution" with which its jurisdiction under section 240, Judicial Code, is exercised, requires that petitioner secure an adjudication of another Circuit Court of Appeals upon the state of facts presented by this record, in conflict with this decision, before this Court is asked to review such decisions.

The general judgment of affirmance by the Circuit Court of Appeals herein is an adoption and affirmance of the findings of fact made by the District Court.

Stringfellow v. *Cain*, 99 U. S. 610, 614;
Corr v. *Hoffman*, 256 N. Y. 254, 263-71.

National Bank, etc. v. *Rogers*, 168 N. Y. 380, 392; *Peo. ex rel Cohesville* v. *D. & H. Co.*, 177 N. Y. 337, 343.

Where two conflicting decisions are each based on concurrent findings of facts, this Court will give "consideration to the question as to which of the decisions upon this question of fact, in the light of the prior art, is based upon the sounder reasoning" (*Thompson Co.* v. *Ford Motor Co.*, 265 U. S. 445, 447). But that cannot be done here. No findings of fact were made in the Sixth Circuit, and there was no affirmative evidence in that case upon which findings of fact as to the prior disclosure of the use of oil or an insulating liquid, fluid at low temperature, in a joint construction or combination like Torchio's, could have been made. Unless this Court could find invention or lack of invention on the basis of facts to be judicially noticed, it would be compelled on a review of both decisions to hold that both are correct, on the facts before the respective courts. But the uniformity of decision rule does not contemplate such a review of dissimilar decisions. The review by certiorari is not ordered to correct defects of proof; nor to point out that the lack of uniformity of decision is due to dissimilar facts. And the writ is not issued to correct errors of decision in individual cases for the benefit of individual litigants, or to give the defeated party another hearing; for such purpose no appeal lies from the judgment of a Circuit Court of Appeals in a patent case.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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December, 1933.